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No. 14-144

In the Supreme Court of the United States

JOHN WALKER, III, in his Official Capacity as Chairman of the Board, *et al.*,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* CHOOSE LIFE, WISCONSIN, INC., ILLINOIS CHOOSE LIFE, INC., AND CHOOSE LIFE AMERICA, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are nonprofit entities that desire to help raise and/or disburse funds generated by "Choose Life" license plates to benefit at risk and disadvantaged mothers and children. *Amici* also represent (or include as members) drivers who wish to purchase "Choose Life" plates and place them on their vehicles in order to provide financial support for these causes and express their personal views about an important moral issue. Accordingly, *amici* have a strong interest in ensuring that such plates are widely available.

Amici and the pregnancy resource centers they support are deeply committed to fostering the well-being of mothers and children by providing resources to support their health and wellness, and by encouraging and increasing public awareness of adoption alternatives and the value of each individual human life from conception through natural death.

Amicus Choose Life Wisconsin, Inc., applied for permission to create a "Choose Life" specialty plate during the 2013-14 Wisconsin legislative session. Although the House of Representatives passed the legislation and the Senate Transportation Committee passed it, the full Senate failed to bring it up for a vote, effectively killing it.

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[1] Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution to fund its preparation or submission. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief. All parties have timely consented to the filing of this brief.

Choose Life Wisconsin intends to bring suit challenging the denial of the plate and accordingly has a strong interest in this Court's proper interpretation of the governing First Amendment principles.

Beginning in 2001, *Amicus* Illinois Choose Life, Inc. ("CLI"), gathered over 25,000 signatures from citizens wishing to display a "Choose Life" license plate. Its repeated efforts to persuade the Illinois General Assembly to approve the plate were rebuffed, however. CLI then filed suit. The federal district court ruled in favor of CLI, holding that the State's refusal to allow a "Choose Life" license plate constituted viewpoint discrimination. *See Choose Life Ill. v. White*, 2007 WL 178455 (N.D. Ill. 2007).

On appeal, the Seventh Circuit reversed. *See Choose Life Ill. v. White*, 547 F.3d 853 (7th Cir. 2008). It concluded that the specialty license plate forum was nonpublic, and (accepting an argument made by Illinois for the first time on appeal) that the Illinois legislature had excluded the entire "subject" of abortion. Based on that rationale, the Seventh Circuit panel held that Illinois had not engaged in impermissible viewpoint discrimination, but only in content-based discrimination, which the panel thought was reasonable and therefore permissible. *Id.* at 865. CLI petitioned for certiorari, but this Court declined to take the case. *Choose Life Ill. v. White*, 558 U.S. 816 (2009).

Amicus Choose Life America, Inc., has dedicated itself as a volunteer consultant to helping individuals and groups all across America to ensure that "Choose Life" license plates are issued in their states. The first effort by its founders began in 1996 in Florida. The Florida efforts were aimed at enabling license-plate

sales that in turn would help fund pre-natal care for women considering adoption services as well as other needed services offered by pro-life pregnancy centers and similar life-affirming agencies. The "Choose Life" plate was made available for sale in Florida on August 11, 2000. Since that time, interest has mushroomed in state after state. The "Choose Life" license plate is now available in 29 states and the District of Columbia. Over 950,000 plates have been sold or renewed, raising more than $21,000,000 for the causes of women's health, life, and adoption. Of the states that have not yet permitted a "Choose Life" plate, only five have no group currently working to obtain permission to issue the plates. In every other state, efforts are ongoing.

Amici desire to offer a "Choose Life" license plate to willing buyers in Illinois and Wisconsin as well as the other states where efforts to pass a bill have thus far been unsuccessful. In addition, *amici* are concerned for their First Amendment right (and the right of their members) to access the specialty license plate forum and express a message of life and hope. The expansion of the government speech doctrine would infringe not only on *amici's* rights but also on the rights of countless other groups and individuals in every state. Given *amici's* strong interest in the issues presented and their active participation in efforts to win permission of "Choose Life" plates (as well as litigation over the constitutionality of state efforts to suppress their expression of this viewpoint), *amici* suggest that this brief may be helpful to the Court.

SUMMARY OF ARGUMENT

Although automobile license plates "are still used for their original purpose of tracking individuals," they

have "over the years become a way for Americans, who spend an average of 56 minutes a day in their cars, to express their identity." Katherine Marsh, *License To Shill*, Legal Affairs, Jan/Feb. 2003, *50, *52. As such, specialty plates implicate the First Amendment.

By creating the specialty license plate scheme and allowing private groups to craft their own design and message, Texas has intentionally opened a venue for private speech. Although there is confusion in the lower courts regarding the proper means of classifying various fora, the forum here would appear to be a designated public forum because the State has opened it for use by the general public for expressive activity. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Judged by the legal standards applicable to designated public fora, the State's denial of Respondents' application for a specialty plate constituted impermissible viewpoint discrimination.

Amici also wish to highlight the dangers to the Free Speech Clause posed by an expansive interpretation of the government speech doctrine. Unless the government speech doctrine is carefully cabined by clearly defined limits, it poses a serious risk of harming the First Amendment rather than preserving the robust culture of free speech that is essential to a free society. With specialty license plates in particular, a blurring of the line separating government and private speech opens the way for legislatures to manipulate their plate approval schemes in order to squelch disfavored viewpoints. It also invites government domination of the marketplace of ideas, because more government speech almost always equals less private speech.

Finally, as illustrated by the facts in this case, misuse of the government speech doctrine lends itself to the imposition of a "heckler's veto" on controversial topics. *Amici* therefore urge this Court to reject the temptation to apply the government speech doctrine mechanically to the facts of this case, given the stark differences in the nature of the specialty license plate forum as compared to prior applications of government speech and the broad use of such plates to advance private expression.

ARGUMENT

I. Texas's Forum Inviting Specialty License Plates Custom-Designed by a Private Actor and Containing a Message Uniquely Crafted by the Private Actor Constitutes a Designated Public Forum for Speech.

A. The Custom-Designed Specialty Plates Implicate Private Speech.

Contrary to Petitioners' assertion (Pet. Br. 22-23), specialty plates under the Texas scheme that are designed and sponsored by a nonprofit organization[2] assuredly implicate private speech. Inviting private actors to custom-design a specialty plate for display on privately owned vehicles that contains the actors'

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[2] In fact, although the original rules stated that this option was available only to nonprofits, *see* Tex. Transp. Code § 504.801(b), in practice the Department now allows anyone to apply. *See* http://www.txdmv.gov/txdmv-forms/doc_download/674-how-to-propose-a-specialty-license-plate ("Anyone—including individuals, non-profit organizations, and for-profit entities—can propose a design to My Plates.") (last accessed February 9, 2015).

unique and specially crafted message is predominately if not entirely private speech, not government speech. Consequently, First Amendment protections should attach.

This Court long ago affirmed that speech on license plates sufficiently implicates private speech to warrant First Amendment protection. *See Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (State could not force citizens to bear state motto on license plates). The entire foundation for this Court's decision in *Wooley* was the assumption that individual speech was involved when individuals displayed a license plate on their private vehicles that contained a message beyond the identifying information of the license plate number. *Id.* at 714. If this principle is true where the government selects the message and only one message is available, *a fortiori* it is true where the government has allowed individuals the opportunity to create and select their own messages to be displayed on the plates.

The Texas scheme sets forth three different ways to create a specialty plate. *Texas Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388, 390 (5th Cir. 2014). First, the legislature may create and specifically authorize a plate.[3] *Id.* Second, anyone may create a

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[3] This case presents no occasion to decide whether a specialty plate that is specifically created and authorized by the legislature contains government speech if the State exercises near-absolute control over its design and message. *Cf. ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 372, 376 (6th Cir. 2006) (legislature passed an act specifically authorizing, creating, and issuing a "Choose Life" license plate; held, the plate constituted government speech, not private speech). That category of specialty plates is not at issue here.

specialty plate through a third-party vendor. *Id.* Third, the Department of Motor Vehicles Board ("the Board") may issue the plate, either on its own initiative or in response to an application by a nonprofit organization. *Id.* It is this third method that is at issue here: Respondents initiated the request for the plate at issue. *Id.*

Under this third option, when the plate is initiated by a nonprofit organization, the design is created by the nonprofit and every word of its message is crafted and overseen by that nonprofit. The finished product is then placed on the vehicles of private parties, who pay a premium for the privilege of displaying that particular message to thousands of passing motorists. Indeed, as Respondents point out, Resp. Br. at 7, ultimately it is only the owner of the vehicle who publishes the speech on a specialty plate; but for his decision to purchase and display the plate, no speech would occur. This fact pattern is clearly distinguishable from that in *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005), in which the promotional campaign was "from beginning to end the message established by the Federal Government." *Id.* at 560.[4] Not so here.

This case is also easily distinguishable from *Rust v. Sullivan*, 500 U.S. 173 (1990), which simply upheld restrictions placed on the use of federal funds within

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[4] In addition, as noted by the Ninth Circuit and Judge Martin in his dissenting opinion in *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 373 (6th Cir. 2006), *Johanns* is distinguishable because that case involved "a government-compelled subsidy of government speech," and specialty license plates involve neither a subsidy nor (arguably) government speech. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 964 (9th Cir. 2008) (citing *Bredesen*).

the narrow confines of a family planning initiative. The fact that the State here retains the right to review and approve the general design that appears on a plate produced within the State's specialty plate program does not and cannot transform the nonprofit's chosen message into government speech. Rather, it is more appropriately analogized to *Wooley*, in that even complete governmental control over the design and content of the message, when exercised in the context of license plates that individuals display on their personal property, still implicates the free speech rights of individuals. *See id.* at 715 (referring to license plates with mottos on them as requiring drivers to "use their private property as a 'mobile billboard' for the State's ideological message.").

In fact, Petitioners' argument proves too much. Under the State's theory, it may transmute any expression occurring on or in any government-owned property or government-run program into government speech simply by decreeing that the State retains veto power. Thus, public parks may be transformed from traditional public fora into nonpublic fora under the State's thumb; student speech occurring in government-owned public schools may be severely restricted merely by adoption of a policy imposing a government veto over it; and a city that purchases all the billboards in town could exert absolute control over all speech on them. In short, the State's theory would cripple the First Amendment.

After all, as the Fifth Circuit correctly observed, "states have not traditionally used license plates to convey a particular message to the public." *Vandergriff*, 759 F.3d at 394; *see also Wooley*, 430 U.S. at 716 (one

reason advanced by state for including motto on license plate was for identification purposes). And if the State does choose to convey a message to the public under Texas's scheme, it has a separate avenue to do so—under the first category of creating a specialty plate, whereby the legislature creates and specifically authorizes the plate. It defies logic to argue that the State has created separate avenues for specialty plates with one such avenue reserved for its exclusive use, and then chosen to bypass this direct and exclusive means of expressing itself in favor of an indirect system in which a nonprofit custom-designs a plate containing a message developed entirely by the nonprofit, and for which the purchaser pays a premium.[5]

At most, as the Fourth Circuit found, specialty plates constitute a mix of private speech and government speech. *See ACLU of N.C. v. Tata*, 742 F.3d 563 (4th Cir. 2014) ("We have no hesitation in holding that the 'Choose Life' plate at issue here implicates private speech rights and cannot correctly be characterized as pure government speech."); *see also Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., concurring in denial of rehearing en banc) ("speech in fact can be, at once, that of a private

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[5] Judge Smith is therefore mistaken when he asserts in his dissent that if the speech on specialty plates is private speech then "Texas may not speak on its license plates." *Vandergriff*, 759 F.3d at 408. In fact, Texas may speak whenever it desires, provided it uses the first means of creating a specialty plate, whereby the legislature devises the message and specifically authorizes the plate. Furthermore, the State has done just that in some 232 instances. *See* Resp. Br. at 2.

individual and the government," and speech on a specialty license plate may be the "quintessential example of speech that is both private and governmental because the forum and the message are essentially inseparable"). But even then, as the Fourth Circuit correctly held, private speech rights are sufficiently implicated to warrant First Amendment protection.

The speech appearing on a specialty license plate and displayed on a private vehicle is therefore much more strongly associated with the private speaker than speech on a monument, as was the case in *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009), and consequently should enjoy a greater degree of protection under the First Amendment.[6]

B. The Texas Scheme Creating a Category for Custom-Designed Specialty Plates Constitutes a Designated Public Forum.

1. There is confusion over the public forum doctrine.

There is continuing confusion among the lower courts regarding the public forum doctrine in the wake of *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009) and *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010) (recognizing three types of forum, the

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[6] Judge Smith is therefore mistaken when he argues in dissent that *Summum* has already settled the question of how to deal with this kind of mixed speech; the distinctly different factual context of a monument as compared to a license plate means that it did not. *Vandergriff*, 759 F.3d at 408-09.

traditional, the designated, and the limited public forum). *See, e.g.*, *Galena v. Leone*, 638 F.3d 186, 197–98 nn.8-9 (3d Cir. 2011) ("There appears to be some inconsistency in federal courts' opinions, even those of the Supreme Court, as to whether a limited public forum is a separate category or a subset of a designated public forum with a third category of forums being 'nonpublic forums.'"); *Bloedorn v. Grube*, 631 F.3d 1218, 1230 (11th Cir. 2011) (stating that this Court "has broadly discerned *three* distinct (although not airtight) categories of government property for First Amendment purposes: traditional public fora, designated public fora, and limited public fora") (emphasis added).

In fact, the confusion over the public forum doctrine predates *Summum* and *Martinez*. *See, e.g., Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 969 (9th Cir. 2008) ("The designated and limited public forum classifications 'ha[ve] been the source of much confusion.'") (quoting *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001)).[7]

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[7] *See also Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128 (9th Cir. 2011) (recognizing *four* categories of fora); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1118 (10th Cir. 2012) (noting that the Court's use of the term "limited public forum" has been "inconsistent"); *Cyr v. Addison Rutland Supervisory Union*, 2014 U.S. Dist. LEXIS 141406 (D.Vt. Sept. 30, 2014) (describing limited public forum as "a subset of the designated public forum" and noting that strict scrutiny applies to "restrictions on speech that fall within the designated category for which the forum has been opened" (*quoting Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 142, 143 (2d Cir. 2004), *citing Hotel Emps. & Rest. Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 545 (2d Cir. 2002)); *NAACP v. City of Philadelphia*, 2014 U.S.

This Court's prior decisions have sometimes identified the limited public forum as a subset of the designated public forum and therefore subject to strict scrutiny. *See, e.g., Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992) ("The second category of public property is the designated public forum, whether of a limited or unlimited character—. . Regulation of such property is subject to the same limitations as that governing a traditional public forum.") (*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 46 (1983)); *Cornelius v. NAACP Legal Def.& Educ. Fund, Inc.*, 474 U.S. 788, 802, 800 (1985) (limited public forum is subset of public forum; "speakers cannot be excluded without a compelling government interest"). More recently, however, the Court has deemed speech in a limited public forum worthy of no more protection than speech in a nonpublic forum. *See Martinez*, 561 U.S. at 679, n. 11 ("in [a limited public] forum, a governmental entity may impose restrictions on speech that are

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Dist. LEXIS 105239 (E.D. Penn. Aug. 4, 2014) (stating "it is unclear what categories of fora even exist"); *compare Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F.Supp. 2d 456, 469 (S.D.N.Y. 2012) ("In its First Amendment jurisprudence, the Supreme Court has classified government property into *three* general categories: traditional public forums, designated public forums, and nonpublic forums.") (emphasis added) *with Hassay v. Mayor & City Council of Ocean City*, 955 F.Supp. 2d 505, 518 n.12 (D.Md. 2013) ("For the purpose of analyzing restrictions of speech on public property, the Supreme Court has divided such property into [*four*] categories: the traditional public forum, the designated public forum, the limited public forum, and the non-public forum.") (emphasis added; citations omitted); *see generally* Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, 82 St. John's L. Rev. 106 (2008) (collecting cases).

reasonable and viewpoint-neutral") (*quoting Summum*, 555 U.S. at 470).

2. Texas has created a designated public forum here.

Here, Texas has intentionally created a forum for public discourse by instituting a specialty license plate scheme under which a nonprofit organization may custom-design its own plate and craft every word of the message contained on it. Moreover, the Board must approve only the overall *design*; it has no input into the specific content of the message. *Vandergriff*, 759 F.3d at 390;[8] *see also Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 966 (9th Cir. 2008) ("The Commission's de minimis editorial control over the plate design and color does not support a finding that the *messages* conveyed by the organization constitute government speech.") (emphasis in original). Furthermore, Texas requires a deposit of $8,000 before manufacturing on a new specialty plate begins, which is returned once 800 plates are sold. *See* http://www.txdmv.gov/motorists/license-plates/sponsoring-a-specialty-license-plate (last accessed Feb. 13, 2015). This would seem entirely unnecessary if the message were simply the government's speech all along.

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[8] The Board "may refuse to create a new specialty license plate *if the design might be offensive to any member of the public*." *Id.* (quoting Tex. Transp. Code Ann. § 504.801(c) (emphasis added)). The Fifth Circuit correctly determined that this vague "standard" impermissibly vested State officials with unbridled discretion which invites viewpoint discrimination. *Vandergriff*, 759 F.3d at 398-99.

The district court here found this third means of creating a specialty license plate to be a nonpublic forum, agreeing with the Fourth and Seventh Circuits. *Id.* at 391; *see also ACLU of N.C. v. Tata*, 742 F.3d 563 (4th Cir. 2014); *Choose Life, Ill. v. White*, 547 F.3d 853 (7th Cir. 2008). The Fifth Circuit chose not to address the issue of forum analysis. However, when carefully analyzed—and considering the State's intentional act of opening a forum for a wide diversity of specialty plates[9]— it appears that this forum is not a nonpublic forum at all, but a designated public forum.

In *Stanton*, the Ninth Circuit found that because "Arizona took the affirmative step by passing its special license plate legislation of allowing limited access to license plates publicly displayed for expressive conduct as vehicles are driven throughout the state," *id.* at 969, it had created a limited public forum. *Id.*

The best and most thorough analysis, however, was undertaken in *Sons of Confederate Veterans v. Holcomb*, 129 F. Supp. 2d 941, 947-49 (W.D. Va. 2001), *aff'd on other grounds*, 288 F.3d 610 (4th Cir. 2002).

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[9] According to the Fifth Circuit, Texas currently recognizes over 350 specialty plates. *Vandergriff*, 759 F.3d at 395. Among this broad diversity of topics are plates for numerous out-of-state universities such as Notre Dame, the University of Alabama, Brigham Young University, the University of Mississippi, and Boise State University. See http://www.txdmv.gov/motorists/license-plates/specialty-license-plates (last accessed Feb. 13, 2015). In addition, specialty plates are available for Remax real estate company, the YMCA, Texas Roadhouse restaurant, the Knights of Columbus, and various NASCAR drivers such as Jeff Gordon, Dale Earnhart, and Dale Earnhart, Jr. *Id.* It strains credulity to maintain that all these messages are the State's.

The *Holcomb* court first considered the government speech vs. private speech dichotomy, and concluded that some specialty plates regarding government matters, such as the state motto or the state bird, do in fact constitute government speech. 129 F. Supp. 2d at 944. However, "plates honoring various occupational associations, civic and fraternal associations, industry associations, and so forth all represent the views of private actors, who are entitled to First Amendment protection." *Id.*

The court then undertook a detailed analysis of the forum, applying *Cornelius*, 474 U.S. at 812 (1985), and concluded that it was a designated public forum. 129 F Supp. 2d at 947-48; *see also* Jeremy T. Berry, *Licensing A Choice: "Choose Life" Specialty License Plates and Their Constitutional Implications*, 51 Emory L.J. 1605, 1624-30 (2002) (arguing that specialty plate forum should be treated as designated public forum; "the 'Choose Life' plates involve an intentional effort by the states to open a nonpublic forum, the standard state license plate"); Jack Achiezer Guggenheim & Jed A. Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. Miami L. Rev. 563, 577-79 (2000) (specialty plates should be considered designated or limited public forum but vanity plates should be considered nonpublic forum). The same is true here.

Clarifying that a forum such as this one is a designated public forum will resolve the difficulties brought on both by the inconsistencies in applying forum doctrine and by lower courts wrestling with the

often unclear distinction between content-based and viewpoint-based discrimination in the context of a state's refusing to issue a specialty license plate. *Compare Stanton*, 515 F.3d 956, 972 (finding denial of "Choose Life" license plate to constitute impermissible viewpoint discrimination because of the limited public forum) *with Choose Life Ill. v. White*, 547 F.3d 853 (7th Cir. 2008) (finding denial of "Choose Life" license plate to constitute only content-based discrimination, which it deemed permissible because it occurred in a nonpublic forum).

II. Because Expansion of the Government-Speech Doctrine Entails a Corresponding Reduction in the Freedom of Private Speech, It Should be Extended Only with Great Caution.

"The government speech doctrine is 'recently minted,'" *Vandergriff*, 759 F.3d at 393 (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 481 (2009) (Stevens, J., concurring)), and "correspondingly imprecise." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting). As Justice Souter wrote after leaving the High Court, "the doctrine is still at an adolescent stage of imprecision." *Griswold v. Driscoll*, 616 F.3d 53, 59 n.6 (1st Cir. 2010) (Souter, J.) (declining to undertake a government speech analysis). Further complicating the matter, this Court's most recent decisions addressing the doctrine, *Johanns* and *Summum*, were pluralities involving six (6) and five (5) different opinions, respectively, which examined unusual fact patterns and provided little practical guidance.

Not surprisingly, the doctrine has been ill understood and inconsistently applied. In the specialty

license plate arena alone it has been used to justify both government speech and private speech under very similar factual circumstances. *Compare ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (*Johanns* dictates that specialty license plates are government speech) *with Stanton*, 515 F.3d 956 (*Johanns* analysis is consistent with Fourth Circuit's four-part test developed in *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002), therefore finding that Arizona specialty plates constitute private speech).

Unless the government speech doctrine is carefully constrained, it risks harming the First Amendment and diminishing rather than preserving and protecting fundamental rights of free speech. Absent clear and specific parameters, shrewd legislatures may retool their specialty plate schemes in a manner calculated to discriminate against disfavored viewpoints by the simple expedient of reserving final veto authority.

Further, absent adoption of explicit limits on the government speech doctrine, specialty license plate programs could turn government into a super-censor, because there appears to be no principled distinction between *specialty* plates, which permit customized messages requested by groups and organizations, and *vanity* plates, which permit customized messages requested by individuals. A government that permits an individual to order a "CHUZ LIF" vanity plate cannot rationally claim that the plate is transformed from private into government speech when a group of citizens request issuance of "CHOOSE LIFE" plates.

Amici suggest that the government speech doctrine should not be expanded any further. At a minimum,

however, any expansion of the doctrine in the context of specialty license plates should be limited to those situations where the legislature exercises a far greater degree of control and takes a more active role in selecting, designing, and approving every aspect of the specialty plate—and even then, as *Wooley* makes clear, there remains the individual speech right to refrain from carrying such a message. Merely reserving veto power over the final design and message while delegating administrative oversight over the vast majority of the process is simply not enough to transform private speech into government speech.

Outside the narrow confines of specialty license plates, the government speech doctrine has already been employed to give government officials extraordinary advantages in expressing a favored viewpoint to the detriment of those with an opposing viewpoint. Worse, government speech comes with the imprimatur of "official" approval, exclusive control of powerful channels of communication, and isolation from critical scrutiny in the marketplace of ideas.

Specifically, the doctrine has been employed to protect links on a government website to private groups supporting one side of a hotly contested issue of public concern, but not to the other side, *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314 (2009) (selection of links to place on town website is government speech under *Summum*); to justify use of a public school website, e-mail, and other forms of communication to urge opposition to a legislative bill that proposed tax credits for private and home schooling, *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275 (4th Cir. 2008) (finding that school distribution system was not public forum

and that campaign was government speech); to uphold the financing of government campaign propaganda with taxpayer dollars to defeat a citizen-sponsored ballot initiative against a new taxpayer-funded fire department, *Kidwell v. City of Union*, 462 F.3d 620, 626 (6th Cir. 2006) (2-1 decision) (stating that "[t]he needs of effective governance command that the bar *limiting* government speech be high" (emphasis added)); and to censor a valedictorian speech at a high school graduation ceremony, *e.g., Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219 (10th Cir. 2009) (mandated prior review of content of student speech by school officials converted it into "school-sponsored" speech).

Notwithstanding the diminishment of free speech rights, the government speech doctrine may also work to further limit the free exercise of religion in the public square, given this Court's repeated admonition that "'government may not promote or affiliate itself with any religious doctrine or organization.'" *Summers v. Adams*, 669 F Supp. 2d 637, 639 (D.S.C. 2009) (quoting *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989), and holding that "I Believe" license plate was government speech amounting to a state endorsement of religion in violation of the Establishment Clause).

In short, the government speech doctrine poses a risk of becoming the proverbial child who devoured her mother. Because the doctrine largely insulates one communication forum after another from public debate, "official" speech if given too broad a reading will necessarily drown out the expression of competing viewpoints and perspectives on the part of individuals.

Nor is this all. As this Court warned in the predecessor to *Johanns*: "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors. " *United States v. United Foods*, 533 U.S. 405, 411 (2001). That is exactly what the government speech doctrine would do if expanded.

Whether or not citizens are compelled to pay special subsidies, government speech of a partisan nature poses a grave risk to the fundamental freedoms upon which this great nation was founded. Even when the government agrees with "our side" of a disputed issue, the effect of government occupation of larger areas of the debate on issues of public concern usually means smaller participation by private citizens and ultimately government domination of the debate.

It is axiomatic that the First Amendment is inapplicable to government speech; thus, as government speech on a contested issue increases, private speech must decrease proportionally. At the least, private citizens opposed to the government's position are placed at a decided disadvantage, because the government's resources and channels of communication dwarf those of the private citizen. As the government leviathan inexorably grows larger and larger, so too will the invocation of the government speech doctrine increase, causing a corresponding and inevitable decrease in the First Amendment rights of American citizens.

The Supreme Court of Oregon presciently cautioned almost 30 years ago: "[G]overnment propaganda for its chosen policies can be criticized for denying equal

chances to proponents of competing policies, or for 'drowning out' the free speech of opposing voices ." *Burt v. Blumenauer*, 699 P.2d 168, 299 Or. 55, 68 (Or. 1985) (internal citations omitted); *see also*, Randall Bezanson and William Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1502 (2001) ("If the government can claim to act as a First Amendment right holder, the First Amendment loses coherence, for in such situations there is nothing for the First Amendment to act on or constrain."). Indeed, whether or not the government's right to speak is rooted in the First Amendment (it is not), it threatens to loosen the First Amendment from its constitutional moorings.

CONCLUSION

For all of the foregoing reasons, this Court should find that the Texas specialty plate forum is a designated public forum, and that there is sufficient private speech at issue to warrant invocation of the First Amendment.

Respectfully submitted,

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